'The general head of public policy covers, in English law, a wide range of topics. Agreements may offend against public policy by tending to the prejudice of the state in time of war (trading with enemies, *etc.*), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance) or, in private life, by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling... It is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No court can invent a new head of public policy.' "

In the instant case, the object of the said contract was the construction of a building in Penang. The said contract does not fall within any of the categories mentioned in the judgment of the learned Chief Justice in the passage quoted above. I, therefore, find that the said contract is not opposed to public policy.

For the reasons stated above, I make an order in terms of prayers (1) and (2) of the application.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Allen & Gledhill.*

PALMCO HOLDING BHD. v. SAKAPP COMMODITIES (M) SDN. BHD. & ORS.

[O.C.J. (Zakaria Yatim J.) August 7, 1986]

[Kuala Lumpur – Suit No. C2324 of 1984]

Civil Procedure – Representative action – Requirements – Whether satisfied – R.H.C. 1980, O. 15 r. 12.

In this case, the first, second, third and fifth defendants filed four similar applications. In these applications, they sought the order of the court to strike out the plaintiff's writ of summons and that all further proceedings against them be stayed on the ground that the plaintiff's action is not properly constituted under Order 15 rule 12 of the Rules of the High Court 1980 in that the plaintiff is not entitled to sue on behalf of or as representing all purchasers of palm oil under future contracts which on March 13 & 14, 1984 were declared by the Kuala Lumpur Commodities Clearing House Sdn. Bhd. (KLCCH) to have been defaulted on. A fifth application was filed by the eighth defendant. In this application, the eighth defendant asked the court to stay all proceedings against it and/or the name of the eighth defendant be struck out on the ground that the plaintiff's claim does not disclose any cause of action against the eighth defendant.

Held: (1) in order to succeed in a representative action, the plaintiff must satisfy three requirements. They are: (a) the plaintiff and those represented by it are members of a class and that these members have a common interest; (b) the plaintiff and those it represents have a common grievance; (c) the relief sought is in its nature beneficial to them all. In the present case, the plaintiff and those represented by it have satisfied all three requirements. The applications of the first, second, third and fifth defendants are dismissed;

(2) since the fifth application was not argued at all, no order is made in respect of it.

Cases referred to:

(1) *In re Smith and Fawcett Ltd.* [1942] Ch. 304.
(2) *Leisure and Allied Industries* v. *Udaria Sdn. Bhd.* [1980] 1 M.L.J. 189.
(3) *Duke of Bedford* v. *Ellis* [1901] A.C. 1, 8.
(4) *Smith & Ors.* v. *Cardiff Corporation* [1954] 1 Q.B. 210.
(5) *Hardie and Lane Ltd.* v. *Chiltern & Ors.* [1928] 1 K.B. 663.

APPLICATION.

Sri Ram (*Y.M. Raja Abdul Aziz Addruse* with him) for the plaintiffs.

Cecil Abraham for the first defendant.

W. H. Tang for the second and sixth defendants.

K. H. Choong for the third defendant.

V. Kumar for the fourth defendant.

Kirubakaran s/o Kartigesu for the fifth defendant.

P. P. Royan for the seventh defendant.

S. E. Rajah for the eighth defendant.

Cur. Adv. Vult.

Zakaria Yatim J.: There are four similar applications filed by the first, second, third and fifth defendants. In these applications, they are seeking the order of the court to strike out the plaintiff's writ of summons and that all further proceedings against them be stayed on the ground that the plaintiff's action is not properly constituted under Order 15 rule 12 of the Rules of the High Court 1980 in that the plaintiff is not entitled to sue on behalf of or as representing all purchasers of palm oil under futures contracts which on March 13 & 14, 1984 were declared by the Kuala Lumpur Commodities Clearing House Sdn. Bhd. (KLCCH) to have been defaulted on. A fifth application was filed by the eighth defendant. In this application, the eighth defendant asks the court to stay all proceedings against it and/or the name of the eighth defendant be struck out on the ground that the plaintiff's claim does not disclose any cause of action against the eighth defendant.

At the commencement of the hearing of the applications, the plaintiff applied to the court by way of summons-in-chambers to cross-examine Sim Kian Bian, and Lee Boon Joo, deponents of the affidavits filed by the first and fifth defendants in support of their respective applications. The affidavit in support of the plaintiff's application averred that the action brought by the plaintiff was in a representative capacity as there were numerous persons, including the plaintiff, having the same interest in the subject matter of the suit. They also had a common grievance against the first, second, third, fourth, fifth and sixth defendants. The affidavit stated that the nexus between the plaintiff and those it represented on the one part and each of the defendants on the other part was to be found in one or more of the 5,150 future contracts pleaded in the statement of claim. The plaintiff further stated that the particulars of the several contracts entered into by the first and fifth defendants with the plaintiff were within the knowledge of the deponents who the plaintiff wished to cross-examine. According to the plaintiff, the purpose of the cross-examination was to establish (a) the substantive grounds necessitating a representative action and (b) the knowledge of the deponents of the several contracts and particulars thereof.

Mr. Sri Ram, counsel for the plaintiff, submitted in support of the application, that the purpose of the cross-examination was to show that the defendants did not have a fair motive to strike out the writ. In support of his submission, he relied on two cases, namely, *In re Smith and Fawcett Ltd.*[1] and *Leisure and Allied Industries Pty. Ltd.* v. *Udaria Sdn. Bhd.*[2]

Mr. Cecil Abraham, counsel for the first defendant, opposed the plaintiff's application to cross-examine the two deponents. He said the plaintiff made the application in order to embark on discovery. He denied that the first defendant had an improper motive.

After hearing the arguments of both counsel for the plaintiff and the defendants, I allowed the plaintiff's application to cross-examine the two deponents of the defendants' affidavit. Order 38 rule 2(3) of the Rules of the High Court gives the court the discretionary power to order the two deponents to attend court to be cross-examined on the affidavits affirmed by them. The test of whether an application to cross-examine a deponent of an affidavit is to be allowed or not is clearly laid down by Salleh Abas F.J., as he then was, in *Leisure and Allied Industries Pty. Ltd.* v. *Udaria Sdn. Bhd.*[2] In that case he said:

> "To allow or not to allow the respondent's application to cross-examine the appellant's witnesses upon their affidavits... is a matter of court's discretion... It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit must be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause, vexatious or motivated by desire to delay the proceedings."

In the instant case, the plaintiff's application to cross-examine the two deponents of the affidavits was not without just cause. The application was not vexatious nor was it motivated by desire to delay the proceedings. Counsel for the plaintiff had rightly told the court that one of the reasons to cross-examine the deponents was to establish that the defendants had no grounds to strike out the writ of summons.

I shall now deal with the merits of the applications by the first, second, third and fifth defendants. In order to consider these applications, it is necessary to examine, first of all, who are the parties to the present suit and what the plaintiff and those represented by it are claiming against the defendants.

The plaintiff brought this action on behalf of itself and on behalf of and as representing other purchasers of crude palm oil under futures contracts which, on March 13 & 14, 1984, were declared by the seventh defendant to have been defaulted on by the first, second, third, fourth, fifth and sixth defendants (the said defendants).

The seventh defendant, the Kuala Lumpur Commodities Clearing House Sdn. Bhd. (KLCCH), is a private limited company formed pursuant to the provisions of the Commodities Trading Act 1980. Its affairs are, at all material times, regulated by its memorandum and articles of association and by its regulations. The KLCCH is the clearing house of the Malaysian crude palm oil futures market established and operated by the eighth defendant.

The eighth defendant, the Kuala Lumpur Commodities Exchange (KLCE), is a company limited by guarantee incorporated under the Companies Act 1965 and established under the Commodities Trading Act 1980. Its affairs are, at all material times regulated by its memorandum and articles of association and by the rules and regulations made by it. The KLCE deals with the

business in futures contracts, including crude palm oil futures contracts to be done on the floor of the Exchange by open outcry.

The plaintiff and those it represents in the present suit as well as the said defendants are at all material times members of the KLCCH and KLCE.

The first defendant is a commodity broker and a full member and floor member of the KLCE. The first defendant is also a clearing member of the KLCCH. The second defendant is a commodity broker and a full member of the KLCE. The second defendant is also a clearing member of the KLCCH. The third defendant is also a commodity broker. It is a full member anda floor member of the KLCE. It is also a clearing member of the KLCCH. The fourth, fifth and sixth defendants are clearing members of the KLCCH and are also members of the KLCE.

I shall now turn to the statement of claim. Paragraph 5 of the statement of claim states that on diverse dates, 5,150 futures contracts in total value of about $160,000,000 made in accordance with the KLCE rules were registered by the KLCCH pursuant to its regulations. Each of such contracts was so registered in the name of the plaintiff or one of the other purchasers it represents, as the buyer, and in the name of one of the said defendants as the vendor. In paragraph 6, the plaintiff avers that on March 13, 1984, the KLCCH declared the first, second, third, fourth and fifth defendants to have been in default of the contracts respectively registered in each of their names. On March 14, 1984, the KLCCH declared the sixth defendant to have been in default of the contracts registered in its name. In paragraph 7, the plaintiff further avers that the KLCCH, in exercise of its powers under the KLCCH Regulations, decided to liquidate all the said contracts by invoicing back and accordingly requested the KLCE to fix the price for the compulsory settlement of those contracts. The plaintiff also avers in paragraph 8 that by its letter dated March 14, 1984, the KLCE purported to fix the following prices for the compulsory settlement of the contracts which were declared on March 13, 1980 to have been in default: March – $1,520; April – $1,410; May – $1,305; June – $1,160; and July $1,030.

In paragraph 9 the plaintiff again avers that by a letter dated March 15, 1984, the KLCE purported to fix the following prices for the compulsory settlement of the contracts which were declared on March 14, 1984 to have been in default: March – $1,520; April – $1,500; May – $1,405; June – $1,268; and July – $1,030.

Paragraph 10 states that in so fixing the said prices, the KLCE failed to comply with the KLCE rules and neglected or failed to include in those prices a sum reasonably sufficient to compensate the plaintiff and the other purchasers it represents for their loss suffered by the contracts having been defaulted on by the said defendants. The plaintiff further states in paragraph 11 of the statement of claim that by a letter dated March 17, 1984 the KLCE revised the prices it had fixed earlier as follows:

"(a) In respect of the contracts declared to have been in default on the 13th day of March 1984 –

		$
March	Invoice Back Price	1,520.00
	Compensation	104.50
	Settlement Price	1,624.50
April	Invoice Back Price	1,410.00
	Compensation	139.50
	Settlement Price	1,549.50
May	Invoice Back Price	1,305.00
	Compensation	176.50
	Settlement Price	1,481.50
June	Invoice Back Price	1,160.00
	Compensation	190.00
	Settlement Price	1,350.00
July	Invoice Back Price	1,030.00
	Compensation	100.00
	Settlement Price	1,130.00

(b) In respect of the contracts declared to have been in default on the 14th day of March 1984 –

		$
March	Invoice Back Price	1,520.00
	Compensation	185.00
	Settlement Price	1,705.00
April	Invoice Back Price	1,500.00
	Compensation	185.00
	Settlement Price	1,665.50
May	Invoice Back Price	1,405.00
	Compensation	132.50
	Settlement Price	1,537.50"

Paragraph 12 states that the KLCCH had only paid to the plaintiff and the other purchasers it represents the respective invoice back prices fixed by the KLCE as set out above. In paragraph 13 the plaintiff avers that until full payment of the settlement prices as stated above has been effected, the contracts remain unliquidated and the KLCCH continues to be liable in respect of those contracts pursuant to the KLCCH Regulations. In the same paragraph the plaintiff states that until their

respective contracts have been liquidated, the said defendants continue to be liable to the plaintiff and the other purchasers it represents for their respective breach of the KLCCH Regulations which led to the contracts being declared to have been in default. In paragraph 14 the plaintiff avers in the alternative that the said defendants are liable to the plaintiff and to those who it represents, in the sum amounting to the difference between the settlement price and the corresponding invoice back prices by reason of the said defendants being in breach of the contract contained in the KLCCH Regulations and for which breach the KLCCH had declared the said defendants to be in default.

The four applications filed by the first, second, third and fifth defendants are based on the ground that the plaintiff's action is not properly constituted under Order 15 rule 12. Rule 12(1) states:

"Where numerous persons have the same interest in any proceedings... the proceedings may be begun, and, unless the court otherwise orders, continued, by *or* against any one or more of them as representing all or as representing all except one or more of them."

The question that arises here is what are the requirements to be satisfied by the plaintiff in order to succeed in a representative action? In *Duke of Bedford* v. *Ellis,*[3] Lord Macnaghten said, "given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." In *Smith & Others* v. *Cardiff Corporation,*[4] the Court of Appeal held that to bring a representative action it must be shown: first, that all the members of the class had a common interest; secondly, that they all had a common grievance; and thirdly, that the relief was in its nature beneficial to them all.

It is clear from *Duke of Bedford's* case and *Smith's* case that the plaintiff has to satisfy three requirements in order to succeed in a representative action. Firstly, the plaintiff and those represented by it are members of a class and that these members have a common interest. Secondly, the plaintiff and those it represents have a common grievance. Thirdly, the relief sought is in its nature beneficial to them all.

Mr. Abraham told the court that there was a fourth requirement, namely, that the defences of the eight defendants must be common. In his written submission, he referred to the case of *Hardie and Lane Ltd.* v. *Chiltern and Ors.*[5] But that case does not support his proposition. In that case, the defendants were sued as representatives of the other members of an association. The Court of Appeal held that there was no ground for saying that the members of the association had the same interest in the action or the defence to it.

In the instant case, Mr. Abraham's client, the first defendant, was not sued as the representative of the other defendants or as the representative of other persons. The plaintiff brought the suit against all the eight defendants in their individual capacities. It is clear, therefore, that the plaintiff, in bringing the representative action has to satisfy only the three requirements as stated above.

I shall now deal with the first requirement namely, whether the plaintiff and those represented by it are members of a class and that these members have a common interest.

According to the statement of claim, the plaintiff and those represented by it were purchasers of crude palm oil under futures contracts which on March 13 and 14, 1984 were declared by the KLCCH to have been defaulted on by the said defendants.

The KLCCH is a clearing house of the Malaysian crude palm oil futures market established and operated by the KLCCH. It is not in dispute that the plaintiff and all persons represented by it as well as the first six defendants are members of the KLCCH and KLCE.

The first, second, third, fourth and sixth defendants are floor members. A floor member is a member of the KLCCH, who is also a floor member of the KLCE authorized to trade by open outcry on the market of the KLCE. See the definition in the KLCCH "General Regulations for Future Delivery Business" (KLCCH Regulations).

The KLCCH guarantees to its members the fulfilment of any contract which is entered into in accordance with the rules of the KLCE. Such contract must be registered with the KLCCH. Only members in whose name such contract is registered are entitled to the benefit of the guarantee (regulation 1, KLCCH Regulations). The KLCCH only registers contract particulars of which are presented by or on behalf of floor members (regulation 3, KLCCH Regulations). Where a contract is registered not in the name of the floor member but in the name of another member to whom the contract is transferred, the transferor member has to notify the KLCCH. The transferee member's

confirmation of the contract is then delivered at the office of the KLCCH. The transferee member's confirmation of the contract shall be in the form of a trading statement issued by the KLCCH and signed by the transferee member. A confirmation of a contract by a floor member or by a transferee member constitutes the agreement of such floor member or transferee member to be bound by the KLCCH Regulations in respect of such contract. If the transferee member does not deliver his confirmation at the office of the KLCCH within the prescribed period, the contract is then registered in the name of the transferor member (regulation 5(b), (c), (d), KLCCH Regulations). The KLCCH shall send to each member for whom contracts are registered a daily registration statement specifying the date and other particulars of each registered contract and the date of registration. Contracts once registered are not transferable except as provided in regulation 8. The daily registration statement is the only proof of a contract having been registered and as long as there is no daily registration statement issued, the contract is deemed not to have been registered (regulation 7, KLCCH Regulations).

Once a contract is registered by the KLCCH, if a particular contract is entered into not in the name of the original broker, the record of the KLCCH will show that this contract is purchased by a buyer who is also a member.

According to the daily registration statement issued by the KLCCH to the first defendant as shown in the exhibit attached to the affidavit affirmed by the general manager of the first defendant, the first defendant has sold 2,014 contracts and bought three contracts. It is clear from this exhibit that the first defendant had sold those 2,014 contracts to purchasers, who, under the KLCCH Regulations, are also members of the KLCCH.

It is not in dispute that on March 13, 1984 the KLCCH declared the first, second, third, fourth and fifth defendants to have been in default of the contracts respectively registered in their names. On March 14, 1984, the KLCCH also declared the sixth defendant to have been in default of the contracts registered in its name. According to the affidavit of the acting chief executive of the KLCCH affirmed on July 28, 1984, the six defendants had defaulted in the payments which were due and payable to the KLCCH. Under regulation 11 of the KLCCH Regulations, the six defendants were accordingly declared in default.

The futures contracts involved in the default were 5,150 (including the 2,040 contracts sold by the first defendant) and the total value of those contracts were about $160,000,000. These contracts were registered in the names of the first six defendants as vendors. From the evidence available to the court, there had been full settlement by the defaulting parties in respect of the 5,150 futures contracts. According to the affidavit of Ahmad Habib, the KLCE was determining the amount of compensation to be paid in respect of all the defaulted contracts.

The first question for the court to consider now is whether the plaintiff and those represented by it are members of a class and that these members have a common interest. The plaintiff and those represented by it are members of the KLCCH and the KLCE. They are also the purchasers in respect of the 5,150 futures contracts. To my mind, they are members of a class. The common interest of the members of the class is the compensation element fixed by the KLCE as pleaded in paragraph 11 of the statement of claim. The compensation element is the difference between the full settlement price and the invoice back price.

With regard to the second requirement the question is whether the members of the class have a common grievence. I find that there is a common grievance among members of the class when the KLCE declared a default in respect of the 5,150 contracts. There is also a common grievance with regard to the prices fixed by the KLCE in respect of the defaulted contracts. The plaintiff and those it represents have a common grievance against all the first six defendants for the defaults. They also have a common grievance against the KLCCH and the KLCE.

The third requirement is whether the relief sought is in its nature beneficial to all members of the class. In the statement of claim the plaintiff and those represented by it ask in prayer 1, for a declaration that the KLCCH is liable to pay to the plaintiff and the other purchasers it represents, in respect of each of the contracts declared to have been defaulted on and respectively registered in the respective names of the defendants, the difference between the settlement prices and invoice back prices. Alternatively, the plaintiff and those represented by it ask for a declaration that the defendants are liable to pay the plaintiff and the other members of the class in respect of each of the defendants' contracts declared by the KLCCH to have been in default such difference in price.

The plaintiff and the other purchasers represented by it also ask for a mandatory injunction compelling the KLCCH to pay the plaintiff and the other purchasers it represents such difference as referred to in prayer 1. In my opinion, the prayers stated in the statement of claim are beneficial to the plaintiff and all the other purchasers represented by it.

In my judgment the plaintiff and those represented by it have satisfied all the three requirements which are necessary in a representative action.

For the reasons stated above, I dismiss all the four applications filed by the first, second, third and fifth defendants with costs. The eighth defendant did not make any submission before me in support of the fifth application. In fact the fifth application was never argued at all. I therefore make no order in respect of the fifth application.

Order accordingly.

Solicitors: *Sri Ram Zulkifly & Kumar; Shearn Delamore & Co.; Ariffin & Partners; Chooi & Company; Albar Zulkifly and Yap; Kam Woon Wah; Shook Lin & Bok; Zain & Company.*

HO SIM PAT v. CHANG AH NGI & ANOR.

[O.C.J. (Wan Yahya J.) July 7, 1986]

[Malacca — Originating Summons No. 76 of 1984]

Land Law — Mortgage of customary land in 1942 — Occupation of mortgaged land by mortgagee — No repayment of principal or interest of mortgage debt since 1943 — Limitation — Whether right of mortgagee extinguished — National Land Code (Penang and Malacca Titles) Act 1963, ss. 24, 53, 88(1), 99 & 102(1) & (2) — Malacca Lands Customary Rights Ordinance (Cap. 125), ss. 24 & 30 — Limitation Act 1953, ss. 9 & 16.

During the Japanese Occupation of Malaya and precisely on September 21, 1942, the plaintiff mortgaged his land in Malacca to Chang Syoh Ku, as security for repayment on September 2, 1943 of a loan of $1,500 at 14% p.a. interest. The mortgage was duly registered. Ever since 1942, the mortgagee and his family had been in occupation of the land and until this date neither the repayment of the loan nor the payment of interests have been made by the plaintiff. The present defendants were the administrators of the estate of the mortgagee who died in 1971.

The plaintiff claimed for a declaration that the estate or interest of the mortgaged land be extinguished and that the mortgage be discharged or extinguished.

Held, dismissing the application: (1) land subject to the former Malacca Lands Customary Rights Ordinance and entered in the Mukim Register, like the present land, cannot be entered into the Interim Register and will be subjected to the provisions of Parts I, II, VIII, IX and X of the National Land Code (Penang and Malacca Titles) Act 1963 ("the Act") only. Time limit laid down under section 88 of the Act comes under Part VII and therefore does not apply to customary land;

(2) as the limit laid down under the said section 88 will not apply to customary land, it is open to the mortgagee, before the issuance of his title in continuation and its subsequent registration in the Malacca Customary Land Register, to present his claim of pre-existing interest to the Commissioner under section 53;

(3) by virtue of Part VIII of the Act, the mortgage in this case is deemed to be duly registered under the National Land Code;

(4) limitation period will not apply to the National Land Code (Penang and Malacca Titles) Act 1963 or to a proprietor registered under the same Act;

(5) the plaintiff's application failed because the right of the defendants as administrators to the mortgagee in possession has not yet been extinguished and still subsists and because the plaintiff's right to redeem his land has been barred by section 16 of the Limitation Act.

[*Editorial Note:* The appeal against the High Court's decision in this case did not materialize due to want of leave to appeal, and was accordingly dismissed on May 4, 1987 by the Supreme Court (S.C.C.A. No. 326 of 1986: Seah, Mohamed Azmi and Abdoolcader S.C.JJ.)]

ORIGINATING SUMMONS.

A.C. Vohrah for the applicant.

Lee Kong Fee for the respondents.

Cur. Adv. Vult.

Wan Yahya J.: During the Japanese Occupation of Malaysia and precisely on September 21, 1942, Ho Sim Pat, the plaintiff herewith, mortgaged his land EMR 347, Balai Panjang (now known as Lot Nos. 648 and 650) Malacca to Chang Syoh Ku, as security for repayment on September 2, 1943 of a loan of $1,500 (occupation currency) at 14% p.a. interest. The mortgage was duly registered. Ever since 1942, Chang Syoh Ku (mortgagee) and his family had been in occupation of the land and until this date neither the repayment of the loan nor the payment of the interests have ever been made by the plaintiff. The present defendants are the administrators of the estate of the mortgagee who died in 1971.

The plaintiff by this originating summons now claims for a declaration that the estate or interest of the mortgaged land be extinguished and that the mortgage be discharged or extinguished. His counsel argues that the defendants should have